No. 13975.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAM DOCK LUNG, as Guardian *ad Litem* for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of this action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903).

Judgment for the defendant, John Foster Dulles, as Secretary of State, who was timely substituted as appellee in the action, and against each of the plaintiffs, that said plaintiffs are not citizens or nationals of the United States, was docketed and entered February 13, 1953 [T. R. 17]. There being no dispute that the Judgment entered by the District Court is a final Judgment, this Court has jurisdiction of this appeal pursuant to the provisions of Title 28, U. S. C., Sections 1291 and 1294(1).

Statement of the Case.

This is a case in which the plaintiffs seek to prove they are the sons of a Chinese, Tam Dock Lung, alleged to be an American citizen, and who was admitted to the United States in 1909 by the Immigration and Naturalization Service as the son of a native. The plaintiffs were allegedly born in China, in 1925 and in 1927, respectively, and now seek to come to the United States as the sons of an American citizen. The action was filed on their behalf while they were still in China, after the State Department denied them passports. The plaintiffs came here on temporary permits pursuant to the provisions of Section 503 of the Nationality Act of 1940, set out in Appellants' Brief, for the purposes of trial, and the conditions of such permits are that they return to China if they fail to establish their American citizenship.

The District Court, after hearing the testimony of the plaintiffs and their witness, gave judgment for the defendant, that the plaintiffs were not American citizens and were not the sons of Tam Dock Lung. The principal question on this appeal is whether or not that decision by the District Court should be affirmed. In other words, the appellants ask the Court of Appeals to reverse the findings of the trier of the facts, the District Court.

The second question is, whether or not it was error to exclude plaintiffs from the courtroom during testimony of other witnesses, when their attorney waived their right to be present in the courtroom during that period.

Summary of Argument.

I.

WHERE COUNSEL FOR PLAINTIFFS WAIVED THE RIGHT OF PLAINTIFFS TO BE PRESENT IN COURT DURING PORTIONS OF THE TESTIMONY BY WITNESSES ON BEHALF OF PLAINTIFFS; WHERE PLAINTIFFS' COUNSEL WAS PRESENT AT ALL TIMES; AND WHERE THE ISSUES WERE DETERMINED BY THE COURT WITHOUT A JURY, PLAINTIFFS CANNOT NOW CLAIM ERROR.

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ARGUMENT.

I.

Where Counsel for Plaintiffs Waived the Right of Plaintiffs to Be Present in Court During Portions of the Testimony by Witnesses on Behalf of Plaintiffs; Where Plaintiffs' Counsel Was Present at All Times; and Where the Issues Were Determined by the Court Without a Jury, Plaintiffs Cannot Now Claim Error.

The cases under Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) are tried to the court without jury. There is no question but that counsel for plaintiffs was present at all stages of the proceedings.

There is no dispute that Tam Chung Fay and Tam Fay Hing, who filed the action in their own names and also by Tam Dock Lung, their alleged citizen father, as Guardian *ad Litem,* were necessary parties to this action to declare their status as citizens and nationals of the United States. The cases cited by appellants, regarding the necessity of an "indispensable party" being before the Court, refer to the necessity of such parties being named as parties to the action and service of summons thereon if they are other than plaintiffs, in order that the Court may obtain jurisdiction over the persons of the parties, as well as the subject matter of the action. But the fact that plaintiffs are necessary and indispensable parties to the suit has no bearing on, and is not determinative of the question of whether or not during the trial of this civil action such parties *must* be personally present in Court, or whether, through counsel, they may waive their right to be present in Court at the trial.

Amendment VI to the Constitution of the United States, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .", is not applicable to this case.

It is clear from the Transcript of Record [T. R. 21, 22] that Mr. Irwin, counsel for plaintiffs, waived their right to be present during certain portions of the trial. Because of its importance the Transcript of Record at pages 21 and 22 are quoted herewith:

> "The Court: We have adopted the procedure in these cases of excluding all witnesses except the plaintiff. We have the direct examination of all the witnesses before there is any cross-examination.
>
> Mr. Irwin: That is quite agreeable, your Honor.
>
> The Court: That eliminates the accusation that the witnesses got together after cross-examination and fixed up the stories.
>
> Mr. Irwin: That is quite understandable, your Honor.
>
> The Court: It is for the protection of the plaintiffs as well as the government.
>
> Mr. Irwin: It is an assurance to counsel, because we are dealing in a foreign language. When your Honor speaks of the plaintiffs, you mean the guardian *ad litem,* I take it.
>
> The Court: The guardian *ad litem* is usually a witness.
>
> Mr. Irwin: He will be a witness.
>
> The Court: I am talking about the boys.
>
> Mr. Irwin: There are two boys in this case.
>
> The Court: I will allow the two boys to remain in the court room and exclude the guardian, or I will

allow him to remain in the court room and exclude the two boys.

Mr. Irwin: The guardian will be the first witness. It really makes no difference.

The Court: Let's exclude the two boys then. The guardian is really the plaintiff. We will exclude everybody except the guardian *ad litem.*

Mr. Irwin: Will the bailiff show them where to go?

The Court: We'd better have the interpreter tell them.

Mr. Irwin: Shall the interpreter be sworn and then advise them?

The Court: You can advise them before you swear her to tell them where to go."

It was the original intention of the Court to exclude all witnesses from the court room except the witness on the stand and to allow the plaintiffs to remain in the court room. However, in the colloquy with attorney for plaintiffs *(supra)* it was suggested that the plaintiffs be excluded while the guardian *ad litem,* their alleged father, was testifying as a witness. This was then done. It is not true, however, that the plaintiffs were excluded from the court room during the entire trial, except for the times that they were personally on the witness stand. While plaintiff Tam Chung Fay was testifying [T. R. 129 *et seq.*] both the alleged father, Tam Dock Lung, and the alleged brother, plaintiff Tam Fay Hing, were present.

At the conclusion of the testimony of the alleged father [T. R. 128] the Court said: "then let's have the father sit over in the jury box, and call the third son in." The Court referred to Tam Chung Fay as the third son.

Thereafter Tam Chung Fay started to testify and the Court said [T. R. 130] at the conclusion of certain questions: "Now we will ask this witness to sit over in the jury box." Then while Tam Dock Lung, the alleged father, and Tam Chung Fay sat in the jury box right next to the witness box, Tam Fay Hing, the other alleged son, was called to the witness stand [T. R. 134]. It was during the testimony of Tam Fay Hing [T. R. 135 *et seq.*] that the alleged father and Tam Chung Fay seriously prejudiced their case; they attempted to communicate to the witness answers to certain questions. This matter was first raised in the following manner [T. R. 135]:

> "Miss Martin: I will ask the Court to ask the father not to coach the witness.
>
> The Court: I thought I heard something over there a while ago but I wasn't sure. Will you tell the father and son they are not to say anything?"

Further [T. R. 138]:

> "I hope the Court has been noticing the father during this interrogatory.
>
> Mr. Irwin: Has he talked?
>
> Miss Martin: Yes."

And further [T. R. 139] after other questions were asked Tam Fay Hing, the following is contained in the record:

> "Miss Martin: Now, I want the record to show before he answered that question, he looked at the father and the father was telling him the answer. I know it is argumentative to say that, but I want the record to show I noticed it.

The Court: Well, we will have the testimony here. He testified he did not, and now he says he did. I just want to know.

Mr. Irwin: And I want to join with Miss Martin in the statement. I saw the father and the brother both nod in the affirmative before the witness answered. I certainly do not approve of that. I would like to have the interpreter instruct them again that if they indicate by sound or voice or movement any answers, they may be in trouble with the court.

The Court: You might tell them they may be jeopardizing their own case.

Mr. Irwin: That's right."

There are good reasons why the Court, after trying many of these Chinese citizenship cases, has arrived at a method of procedure which excludes all witnesses from the courtroom except the witness on the stand.

In questioning witnesses, particularly members of the family, with regard to collateral facts, about which members of the family or their close friends should all be in agreement, if the witnesses are telling the truth, all witnesses sitting in the courtroom who hear the testimony will be able to confirm it when it comes their time to testify. The only way in which the corroboration of such witnesses can be given any weight by the Court in arriving at the truth, is for such witnesses to be excluded from the courtroom, while the Court is allowing the examination to proceed into collateral matters.

As was said by this Court in the case of *Siu Say v. Nagle,* 295 Fed. 676, "In cases of this character experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely

accepted or relied upon. Resort is therefore had to collateral facts for corroboration or the reverse." And again in the case of *Wong Foo Gwong v. Carr,* 50 F. 2d 362, this Court said: "The immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses."

It is for this reason also that the Court sometimes allows partial cross-examination of a plaintiff party to the action while certain witnesses are excluded from the courtroom, so that later such witnesses can be questioned upon the same matters and if they corroborate such facts, the Court can then give greater weight to such testimony and determine the credibility of the parties. Likewise if the witnesses fail to corroborate the story of the parties on such matters, the Court gives less weight to the credibility of the parties and the burden of the plaintiffs to establish the fact that they are citizens continues.

In arriving at this procedure, consideration has been given to the fact that the parties were born and usually have lived in China all of their lives until the present action is filed, that they and their witnesses are the only persons who know the necessary facts to prove their citizenship, and that the defendant, the Secretary of State, has no affirmative evidence with which to go forward. The defendant must rely entirely upon impeaching the testimony of the plaintiffs and their witnesses, or on developing discrepancies between the testimony of the plaintiffs and their witnesses with regard to facts which should be a matter of common knowledge among members of the family or close friends, so as to discredit the testimony.

This procedure did not prejudice the plaintiffs' case because when plaintiffs were not in the courtroom, the only persons testifying were witnesses on behalf of the plaintiffs who were to be cross-examined by the defense. Where, as here, plaintiffs through their counsel made no objection, but in fact consented to leave the courtroom, there can be no error.

It is an odd commentary that when the alleged father and one plaintiff were sitting in the jury box during examination of the second plaintiff that their efforts to convey to him what they thought to be the right answer to questions which were being asked indicated their knowledge that the witness did not know the right answer and they thereby prejudiced their case.

The case of *Baltimore and O. R. Company v. Chicago River,* cited by plaintiffs, deals with the problem of "indispensable party" and sheds no light on the right of a party, properly joined in an action, to waive his right to be present in Court.

The case of *Fillippon v. Albion Vein Slate Company,* 250 U. S. 76, involved a case where neither the parties *or their lawyer* were present at a critical stage of the action and therefore is not helpful in this case where there is no question but that plaintiffs' attorney was present during all of the trial. In the *Fillippon* case, which was a trial by jury of a negligence action, after the jury was instructed and retired, the jury sent the Judge a written inquiry which the Judge answered by giving them an in-

struction without counsel or the parties having a chance to object to the new instruction or to be present at the giving of it. The Court said at page 81:

> "Orderly conduct of trial by jury . . . entitled parties who attend for the purpose to be present in person *or by counsel* at all proceedings . . ." (Emphasis supplied.)

The Court said the new instruction should have been given either in the presence of counsel or after notice and an opportunity to be present.

In two of the other four cases cited by appellants the Court found no error and the other two cases do not involve factual situations analogous to the present action. In the instant case counsel were present for both plaintiffs at all times of the proceedings and at the times that plaintiffs were not present in the courtroom, counsel had consented to their remaining outside of the courtroom and thereby waived any right to be present.

In the case of *Willingham v. Willingham,* 15 S. E. 2d 514, cited by appellant, an action was filed by the mother to have a previous order, giving custody of children to the father, set aside, because during the trial the parties were excluded from the courtroom while the children, present at the instance of the Judge, were examined by the Judge.

The Court says at page 516:

> "Counsel for the mother was given the privilege and did examine them. It is true that parties as a general rule have the right to be present at all stages of the

trial (citing cases). Nevertheless in a proceeding of the present character, determinable by the Judge without the intervention of a jury, where the principal consideration is for the present and future welfare of the children, and which is not to be strictly governed by rules applicable in ordinary trials (citing cases) we do not think that it was beyond the discretion of the Judge to exclude both parties from the court-room while the children were testifying, where the attorneys representing the parties were allowed to remain, with the privilege of examining them. We cannot see how this could possibly have operated to the injury of either party."

In the case of *Freimann v. Gallmeier,* 63 N. E. 2d 150, a motion for new trial was made in an action of ejectment to recover possession of real property. It was assigned as error that the Court refused to grant appellant a continuance of the trial upon the verified motion of the defendant supported by the affidavit of her attending physician as to her inability to personally attend the trial. The Court said at page 153:

"A more serious question is presented by the ruling of the court in denying appellant's motion for a continuance based upon her physical illness and her inability to attend the trial of said cause, which is supported by the affidavit of her attending physician. Citation of authority is not required to sustain the proposition that a party to an action is entitled to be personally present in court when a trial is held in which he, or she, is a party of record. However, this rule is qualified by the further well-settled rule that a motion for a continuance is addressed to the sound discretion of the trial court, and that the court's action in denying an application for continuance does

not constitute reversible error, where the record affirmatively shows no abuse of such discretion or that a party litigant has not been deprived of any substantial right by the refusal of the trial court to grant a continuance. *Ruddick v. Hollowell,* 1919, 71 Ind. App. 442, 125 N. E. 82; *Louisville, etc., Traction Co. v. Montgomery,* 1917, 186 Ind. 384, 115 N. E. 673; *Sager v. Moltz,* 1923, 80 Ind. App. 122, 139 N. E. 687.

* * * * * * * *

". . . In view of the facts disclosed by the record in this case and the admissions heretofore quoted, we hold that the following provisions of the Indiana statutes are applicable, namely: §2-1071, Burns' 1933, §175, Baldwin's 1934, providing: 'The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect.'

"Also, §2-3231, Burns' 1933, §505, Baldwin's 1934, which reads in part as follows: '* * * nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.'

"After a careful examination of the record, we are convinced that the merits of this cause were fairly tried and determined and that appellant has failed to establish that she has been deprived of any substantial right, or injured, by any ruling of the trial court of which complaint is now made."

In the case of *Ulmer v. Mackey,* 242 S. W. 2d 679, appellant, a defendant in a suit for damages for negligence

alleges as one of seven points of error in the District Court:

> "(4) refusing to permit appellant's absence to be explained of his whereabouts at the time of trial; . . . (6) permitting appellee to argue the absence of appellant as a presumption against him."

The headnote in the Appellate Court which reversed and remanded the cause, summarizes the case as follows:

> "A. E. Mackey brought action against Carl Joseph Ulmer for injuries sustained in automobile collision, wherein defendant filed cross-action. The District Court, Wichita County, Frank Ikard, J., overruled defendant's motion to stay, and entered judgment on verdict returned in favor of plaintiff, and defendant appealed. The Court of Civil Appeals, Hall, C. J., held that where defendant was in military service in Korea at time of trial, which prevented him from performing under automobile liability policy which required him to secure, give and obtain evidence and to assist in conduct of the trial, and jury could have construed defendant's absence as showing that he was insured, and money judgment was against defendant personally, refusal to grant motion for stay made on ground that absence would materially affect conduct of defense and prosecution of cross-action was abuse of discretion.
>
> "Judgment reversed and cause remanded with directions."

In the case of *Leonard's v. Dybas,* 31 A. 2d 496, the action was on a book account and for goods sold. Defendant appealed from a Judgment in favor of the plaintiff. The issues were submitted to a jury. During the course of their deliberations the jury requested further

instructions of the Judge and the Judge gave them instructions without submitting same to counsel. Appellant's counsel, although requesting to be present, was denied admittance during these proceedings. The Court said at page 497: "In the circumstances the action thus taken by the trial Judge constitutes reversible error in matters of law."

The distinction in the *Leonard* and *Ulmer* cases is apparent. Counsel there did *not* waive the right to be present during the additional instruction. In fact they requested to be present and were denied. In the instant case the facts are exactly the opposite.

II.

The Burden Is on Appellants to Prove Their Alleged United States Nationality and They Failed to Sustain That Burden.

Any person seeking to enter the United States as a citizen and national of this country must assume the burden of proof in establishing his nationality. The same burden rests upon a Chinese applicant for admission to the United States to prove that he is the son of an American citizen. This Court has so held in the following cases:

Jung Yem Loy v. Cahill, 81 F. 2d 809;

Wong Choy v. Haff, 83 F. 2d 983;

Wong Ying Leon v. Carr, 108 F. 2d 91.

The burden of proof required where the applicant files a petition for writ of habeas corpus, seeking a review of the Immigration and Naturalization Service Administrative Order of Deportation, is the same as in the present

action, the only difference being that in the present action there is a trial *de novo* by the District Court. The complaints of the plaintiffs allege citizenship, the answers deny citizenship, and on the pleadings alone the burden is on appellants.

The cases of *Siu Say v. Nagle* and *Wong Foo Gwong v. Carr, supra,* have been quoted under Point I of the Argument.

There are two other cases in which the court in habeas corpus petitions considered the use and value of discrepancy testimony and the court's remarks indicate that the proof offered by plaintiff fell short of the burden placed on the plaintiff when viewed in the light of the discrepancy testimony developed. In the case of *Wong Sun Ying v. Weedin,* 50 F. 2d 377, this court said, at page 378:

> In considering the weight of discrepancies, the psychological importance of their subject-matter to the witness should be estimated. If the subject is psychologically important and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence of the test used by this court in the case of Weedin v. Yee Wing Soon, 48 F. 2d 36, 37.
>
> * * * * * * * *
>
> Some of these discrepancies, taken alone, might only indicate the inaccuracy of human observation and the frailty of human memory, but when they are added to what may be called the "key" discrepancies their effect is cumulative to induce in the mind a belief that the parental relationship does not exist between the American citizen and the appellant.

In the case of *Weedin v. Yee Wing Soon,* 48 F. 2d 37, the court said, at page 37:

> The record shows a considerable number of discrepancies between the testimony of the appellee and two previously landed sons of Yee Kam. The appellee relies upon the proposition that the witnesses are in accord upon such a multitude of details concerning their home and village and family life as to convince any reasonable man of the truth of their testimony as to their relationship.
>
> * * * * * * * *
>
> In the case at bar, we have a multitude of agreements upon a great variety of details in the testimony which are quite consistent with the claimed relationship and point with great emphasis to the truth of the claim. On the other hand, we have a discrepancy that is difficult if not impossible to reconcile with the alleged relationship.

The discrepancy to which the court refers is that the father testified his mother died in his house, the house where the plaintiff claimed to have lived. The plaintiff's son testified that the grandmother, his alleged father's mother, died in the house of his brother. The court says: "It is difficult to see how there could be such a discrepancy between the testimony of the father and son if they were living together at the time of her death as they both testify," and concludes, on page 37, as follows:

> There are other discrepancies in the testimony which we will not pause to enumerate except to say that one related to ownership of rice land by the father and the cultivation thereof by the mother and son and showed disagreement which could hardly be expected if the claimed relationship did exist. In

view of these discrepancies it cannot be said that the proceedings before the immigration authorities were unfair. The order of the District Court releasing appellee is reversed, with directions to quash the writ of habeas corpus, and remand the appellee to the custody from whence he was taken.

On the question of the burden of proof, in *Ly Shew v. Acheson,* 110 Fed. Supp. 50, Judge Goodman says, at page 58: "The degree of proof therefore required of plaintiff should be of substantive parity with that required of petitioners for naturalization. . . . Where entry into the United States is sought upon the basis of the entrant's claim to United States citizenship, the rule is that the proof of alleged citizenship must be clear and convincing."

Lee Sin v. United States (C. C. A. 2), 218 Fed. 432;

Ex parte Chin Him, 227 Fed. 131.

A. The Trier of Facts May Refuse to Credit a Witness' Testimony Even Though That Testimony Is Not Contradicted.

Appellant argues (App. Br. 13) that "unimpeached and uncontradicted testimony cannot be disregarded." That is not the view expressed by this Court on January 12, 1954 in its Opinion in the case of *Mar Gong v. Brownell,* ..... F. 2d ....., where this Court said:

"This Court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness' testimony even although that testimony is not contradicted. *National Labor Relations Board v. Howell Chevrolet Co.,* 204 F. 2d 79, 86, (Aff'd. *Howell Chevrolet Co. v. National Labor*

Relations Board, ... U. S. ....., December 14, 1953) (Citing other cases in a footnote). Upon the plaintiff's own theory, all of the witnesses who testified on his behalf are interested and when viewed in this light their mere say-so does not have to be accepted. *Flynn ex rel. Yee Suey v. Ward* (First Cir.), 104 F. 2d 900, 902; *Heath v. Helmick* (9 Cir.), 173 F. 2d 157, 161."

In the instant case the only persons who testified in addition to the two plaintiffs were their alleged father Tam Dock Lung, and alleged brother, Tam Hin Soon. There was no testimony offered by the mother, who is in China, or by any persons not a member of the family.

It is necessary to read the full transcript of the testimony in order to see the way the testimony developed. Many of the questions put by the Court indicate his growing disbelief in the testimony being proferred. As indicated in some of the testimony quoted in the argument under Point One *(supra),* at one stage of the trial the concern of the persons not on the witness stand, that is, the father and the other plaintiff, was such that they were attempting to signal to the plaintiff on the witness stand, the correct answer. That the Court did not believe the witnesses is indicated in the Findings [T. R. 13] and Conclusions [T. R. 14] and the Court's statement at the conclusion of the trial [T. R. 167].

The precise question in these cases is the *identity* of the plaintiffs as the alleged sons. Assuming for purposes of argument that the citizenship of the alleged father is admitted, and assuming that he may have had children in China, the precise question is whether or not the plaintiffs are those children or are they persons attempting to perpetrate a fraud on the Court.

Usually, as in this case, the files of the United States Immigration Service contain statements signed by the alleged father at the time of his return from the various trips to China, indicating the name, sex, and birth date, of children he claims were born in China. While these documents may be considered by the Court as evidence of the true facts, it is always possible, of course, that the alleged father reported the birth of non-existent children. However, even though the documents are taken as true, there is still the ultimate question, are the plaintiffs the sons or daughters the alleged father may have listed on the Immigration Service file. Knowing what the written files of the Immigration Service are going to show, the alleged father and the plaintiff usually do not testify in disagreement therewith. About all such evidence does is to present a basic framework upon which the Court can begin to try and discover where the truth actually lies.

In this case Exhibits 1 to 5, inclusive, are the statements signed by the alleged father for the Immigration Service on his return from his various trips to China. A short chronology indicating when the alleged father made the trips to China and the children he claimed were born, according to Exhibits 1 to 5, is helpful as a framework when reading the testimony. In short, the exhibits indicate the alleged father claims to have had six children, the Number One Son, who died, Number Two Son admitted to the United States in 1935, the Number Three and Number Four Sons, who are allegedly the plaintiffs herein, the Number Five Son, Tam Ching Ting, still in China, as to whom the father gave conflicting testimony and finally indicated he was a six months' child, and the Number Six child, a girl, Tam Mow Dang, still in China.

The chronology is as follows:

November 24, 1888 —Alleged father, Tam Dock Lung, born.

February, 1908 —Alleged father marries in China.

February 5, 1909 —No. 1 Son, Hom Hin Sick, born.

July, 1909 —Alleged father first comes to United States.

November 21, 1914 —Alleged father goes to China *first trip.*

October 11, 1915 —No. 2 Son, Tam Hin Soon, born.

November, 1915 —Alleged father returns to United States.

September 3, 1924 —Alleged father goes to China *second trip.*

October 4, 1925 —Plaintiff, Tam Chung Fay, No. 3 Son, born.

March 5, 1927 —Plaintiff, Tam Fay Hing, No. 4 Son, born.

June 2, 1927 —Alleged father returns to United States from China.

October 11, 1930 —Alleged father returns to China, *third trip.*

March 14, 1931 —No. 5 Son, Tam Ching Ting, born.

November 19, 1932 —No. 6 child, a girl, Tam Mow Dang, born.

October 30, 1933 —Father returns to United States from China.

October 27, 1935 —No. 2 Son admitted to United States.

B. The District Court Was Entitled to Disbelieve the Testimony of Tam Dock Lung, Alleged Father of Plaintiffs, Because of Conflicting Testimony About the Birth of His Fifth Son.

Exhibit 5 in evidence is the statement signed by Tam Dock Lung, the alleged father, in October, 1933, when he returned to the United States and gave the Immigration Service a list of his children. In that exhibit he lists Tam Jing Hing the No. 5 Son (sometimes spelled Ching Ting), as having been born on the Chinese date CR 20-5-26 which the interpreter translated as July 11, 1931. It would appear that a statement made two years later, in 1933, regarding the date of the birth of said son should have been correct.

However, in the testimony at the trial [T. R. 51 to 64, incl.] Tam Dock Lung testified that the fifth son was born on Chinese dates CR 20-1-26 which was translated to March 14, 1931 [T. R. 45]. He further testified [T. R. 43] that he left the United States for China October 11, 1930, or the date may have been September 12, 1930 [T. R. 58], and that he arrived in China on November 3, 1930 [T. R. 55, 61]. When, after a long colloquy and interruptions by opposing counsel and the Court, the question was finally asked the alleged father, "If you arrived in China, according to the English calendar, in October, how can you believe that the number 5 son was your son?", he answered [T. R. 63], "He was a six months' baby."

Later Tam Hin Soon, the No. 2 Son, heretofore admitted to the United States, testified [T. R. 71] that the fifth son was born May 13, 1931.

It is probable that the alleged father and the No. 2 Son discussed the factual matters about which they were

going to testify before coming to Court, and it was natural that they should have discussed the dates of births of the various children because it is common to ask questions regarding the dates of birth. So they may have agreed that the date was CR 20-1-26 or March 14, 1931. It is probable this date was erroneous but it was the one they had in mind.

The alleged father, when faced with Exhibit 5, the written statement to the Immigration authorities, and realizing that only six months had elapsed since he arrived in China before the date given for the birth of the son, showed no hesitancy in coming forward with the answer, "He was born a six months' baby." It is apparent the Court thought the father was merely inventing the most reasonable explanation he could think of at the moment, and a reading of the full testimony in the transcript from pages 51 to 64, inclusive, in the light of the knowledge that the father understands considerable English, as shown by the transcript, although an interpreter was used, sustains the belief that the father realized the predicament and came forward with the ready answer of the six months' son.

When the alleged father was recalled to the witness stand [T. R. 143] and asked if there was any other information he wanted to give, he then testified the correct date of birth was as in Exhibit 5, July, 1931, but still insisted it was a six months' baby.

Regardless of how the testimony is taken, it indicates a readiness on the part of the alleged father to tell an untruth in order to protect the record. If you assume that the son *was* a six months' son, or possibly that the child born was not really the child of Tam Dock Lung,

then it would appear that the alleged father gave a false statement regarding the birth of said child in October, 1933, when he furnished the statement to the Immigration Service on his return to the United States. If he would falsify then to make a record which appeared logical, regarding births of sons, the Court is entitled to disbelieve his testimony now.

Under Point II of Appellee's Brief it is contended that the District Court should not have considered the inconsistent statements of the alleged father regarding his fifth son, because the fifth son was not a party nor a witness. If it is relevant for the alleged father as a witness to testify regarding the whole family and if Exhibit 5, the statement to the Immigration Service in 1933 by the alleged father, when he returned from China, was admissible in evidence, certainly it was proper to impeach the father's statement in that document or to use it to impeach his testimony on the witness stand.

The father is put forward by the plaintiffs as their principal witness and they offer no other tangible evidence of any weight, such as family photographs, (Exhibit 6 was a photograph taken after the application to the State Department for admission into the United States and therefore of no weight as a historical or family document) or ancient letters or other family documents.

If the alleged father is to be allowed to take the witness stand and in effect limit his testimony to the statement "the plaintiffs are my sons" it is obvious that the Court could have no assurance that a fraud was not being perpetrated. It is for this reason that the courts, as indicated in the argument *supra,* have looked to testimony on collateral matters to sustain the plaintiff's burden.

C. Contradictory Testimony Regarding Necessity of a Pass to Leave Plaintiff's Native Village for Hong Kong and the Demeanor of Tam Fay Hing, Plaintiff, on the Witness Stand, Led the Court to Discredit Testimony for Plaintiffs.

The testimony of the second plaintiff, Tam Fay Hing, was never convincing in any respect. His answers were always evasive and not responsive. The Court was entitled to disbelieve his testimony even if there had been no impeachment or contradictions.

However, Tam Fay Hing contradicted the testimony of Tam Chung Fay and the alleged father, when he said [T. R. 135], "I don't remember having one" (a pass) and that it was not necessary to get permission from anyone to make the trip to HongKong [T. R. 137]. Later he corrected his testimony [T. R. 164, 165], that he remembered after he arrived in HongKong his brother had told him he had sent the passes back to their mother.

The father initiated the colloquy on this subject by his testimony [T. R. 118] when he stated in regard to a question why he did not bring the fifth son to the United States, that that son could not leave Canton while he was studying there because the "Communist regime doesn't allow him to leave," and later [T. R. 127] when asked how it was the third and fourth sons were able to leave the new village when the fifth son cannot leave Canton because of the Communists, the father said, "When they were in the village at that time they had a pass to get out of the village," and later he said, "They got permission and after the permission was granted the Communist government took back the slip, the permit, we call it."

The testimony of Tam Chung Fay regarding the pass is contained at transcript pages 129-130, 133, 134.

The testimony of Tam Fay Hing was given, while the alleged father and the other plaintiff sat next to the witness in the jury box, and is contained in the transcript [T. R. 134, 135, 136, 139, 140, 143, 146, 163]. It was during this testimony that the alleged father and the other plaintiff appeared to be trying to give the witness the answers by signals. This was noticed by the Court, as well as the attorneys in the courtroom.

The Court was entitled to believe that the witness, Tam Fay Hing, knew nothing about the situation with regard to whether or not the pass was necessary to get to HongKong, because he had never had that problem and, was not really the person he claimed to be. The fact that he gave other testimony not contradictory, can be attributed to the fact that it was about subjects which it might reasonably be anticipated he would be questioned. The subject of the pass was not anticipated.

There was one other subject about which the Court showed considerable interest in determining whether all of the witnesses testified alike, and that was the relation of the facts regarding the trip from the native village to Kong Moon to Macao to HongKong. The testimony of all of the witnesses regarding the time it takes to make this trip and the route taken is so confusing that it is almost impossible to follow.

Conclusion.

The Transcript of Record shows that the District Court gave the testimony of the witnesses of the plaintiff careful consideration, that every effort was made to allow the plaintiffs to explain discrepancies in testimony, and it is clear that the Court as the trier of the facts, reluctantly came to the conclusion that he did not believe the testimony of the witnesses and the plaintiff. The judgment for the defendant should be affirmed.

Respectfully submitted,

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